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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 314.

NILES BEMENT POND COMPANY, *Petitioner*,
vs.
THE UNITED STATES, *Respondent*.

REPLY BRIEF OF PETITIONER.

KARL D. LOOS,
E. BARRETT PRETTYMAN,
PRESTON B. KAVANAGH,
Attorneys for Petitioner,
707 Munsey Building,
Washington, D. C.

Washington, D. C.,
March 6, 1930.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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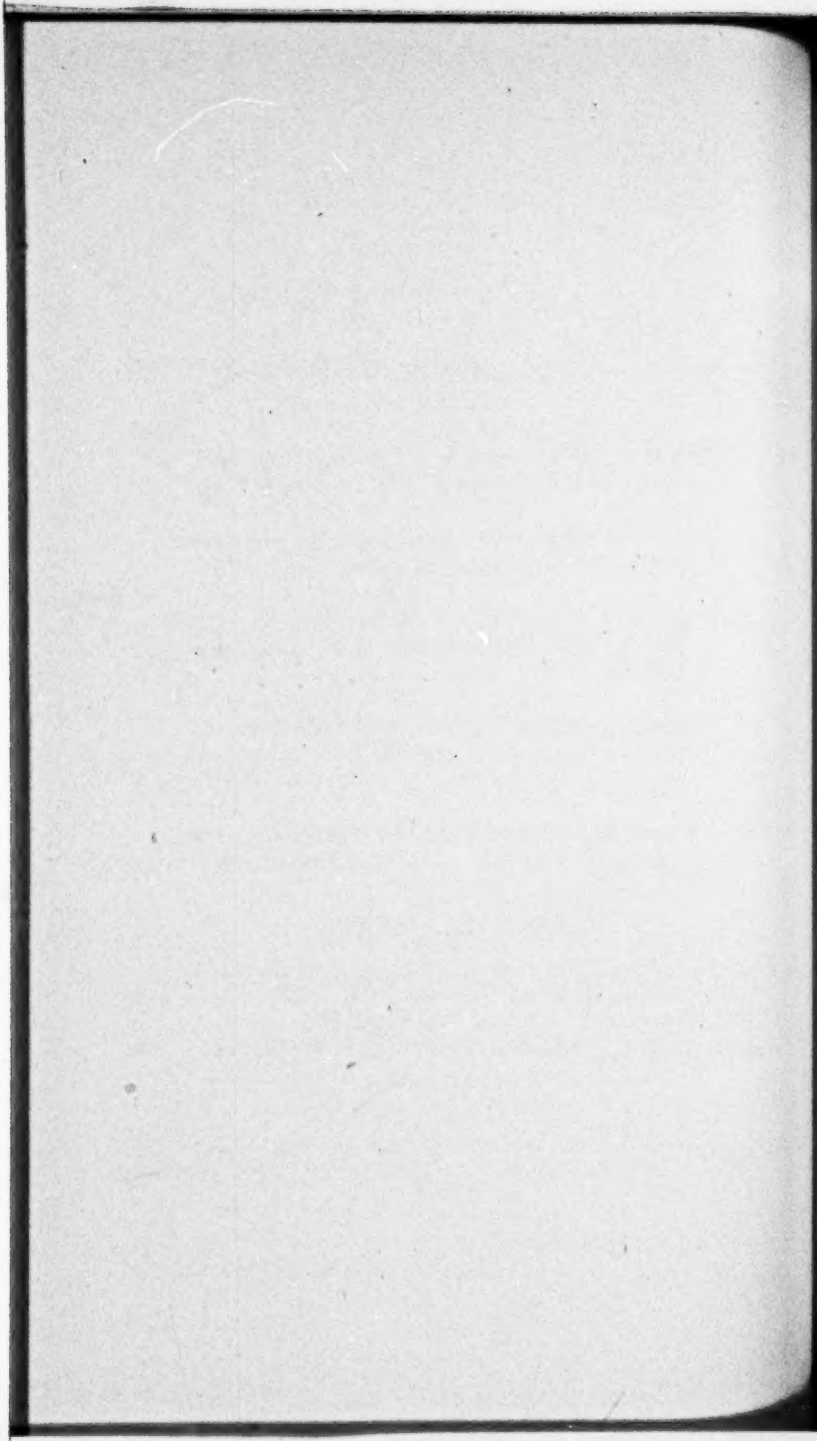

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I.

(a) The Government errs in confusing the provisions of the 1916 and 1918 Revenue Acts.

The Government's brief quotes portions of the 1916 Revenue Act (Sections 12 (a), 13 (d)) which act we think is not here involved except as a matter of historical interest in the evolution of the 1918 Revenue Act. The latter act must govern in the determination of this case. From the 1918 act, the Government's brief quotes (page 10) a provision of section 200 defining the

terms "paid" and "accrued," which definition refers to section 212, but the Government's brief at this point does not refer to section 212 (b) which provides that the method of accounting referred to in section 200 is the method of accounting regularly employed by the taxpayer in keeping its books. Having made this omission, the Government proceeds to argue that the basis on which *the return was filed* rather than the basis on which *the books were kept,* is the test to be applied in deciding this case.

Pursuing this argument (pages 10-11), the Government argues that the only applicable finding is that to the effect that the returns were filed on an accrual basis. We think the Government has confused the requirements of the 1916 Act with those of the 1918 Act. Under the 1916 Act, the basis on which a taxpayer filed its return determined whether or not the taxpayer had elected the option under Section 13 (d) to make a return upon other than a cash basis. However, under the 1918 Act, the basis of the return is immaterial. There is no option for the taxpayer to elect. Regardless of how he may purport to make out his return, the statute requires that the income shall be computed in accordance with the method of accounting regularly employed in keeping the taxpayer's books of account.

(*b*) *Petitioner regularly employed a mixed cash and accrual method of accounting.*

The findings must be read together. So read, the fact is clear that the petitioner's books were on a mixed cash and accrual basis. The lower court's conclusion that the books were kept on an accrual basis is shown by the opinion to rest on its view that the statute required either a cash or an accrual basis and permitted

no intermediate ground. The lower court thus concluded that the petitioner's books and returns were on an accrual basis because the majority of its accounts were kept on an accrual basis. This was a conclusion of law and not a finding of fact. The findings clearly show the existence of a mixed cash and accrual method of accounting regularly employed by petitioner. The application of the statute to such a state of facts is the question of law here presented.

(c) *Petitioner's method of accounting for its British tax payments was at all times consistent.*

The Government also argues that the same methods of accounting must be applied to both sides of the account. That is unquestionably true when dealing with a given account. However, in this case we have a distinct group of accounts, applicable to the London Office, which of necessity were handled at that office. In those accounts the cash basis was consistently used; the accounts in which the accrual basis was used were entirely separate and distinct, were kept wholly in the United States and did not relate to the London office.

The situation here presented is not that of an isolated entry on one basis in an accounting system, all the balance of which is on another basis. That was the kind of an entry that the Court referred to in *United States vs. Mitchell*, 271 U. S. 9, 12-13, in the statement quoted at page 12 of the Government's brief.

The exigencies of business frequently require that certain groups of accounts be kept on a basis differing from that of the principal accounts. In this case, the foreign office accounts were kept on a cash basis in

order to avoid complicated accounting systems in distant foreign offices and in order to avoid complications of foreign exchange which would be exceedingly burdensome in accrual systems dealing with different and fluctuating foreign currencies. Petitioner has consistently treated the London Office accounts on a cash basis. It always has done so and of necessity always will do so.

(*d*) *Commissioner of Internal Revenue made no finding that petitioner's method of accounting did not clearly reflect income.*

The Government's brief does not charge that the Commissioner of Internal Revenue made a finding that petitioner's method of accounting did not clearly reflect income. We suppose that the Government recognizes here what it vigorously argued in *United States v. American Can Company* (No. 128 this Term, decided February 24, 1930), and what we understand the Court there held, that the mere correction of an alleged error does not constitute a rejection of the method of accounting employed and is not equivalent to a finding that the method of accounting employed failed to clearly reflect income.

In this connection the Government also suggests that the Record does not show the exact form of the return. This, however, is immaterial. Under the 1918 Act, the test is the method of accounting employed and the findings do show the method of accounting employed so far as it relates to the matter here in controversy. Furthermore, the findings disclose that the British tax payments were claimed as a credit on the petitioner's 1918 tax return and that this claim was disallowed. (Finding VI, Record 28.)

The suggestion (advanced for the first time in this Court) that the petitioner's method of accounting does not clearly reflect the income, has already been discussed in our original brief. (Pages 23-28.)

II.

Petitioner does not seek a determination of the question of when the British taxes accrued.

Referring to Point II of the Government's brief (pages 14-16) we have not contended that the excess profits duty accrued (in the sense in which that term was used by the Court in its decision in *United States v. Anderson*, 269 U. S. 422) in 1918. It is undoubtedly true, as suggested by the Government's brief, that the income tax paid to the British Government for the tax year beginning April 6, 1917, and ending April 5, 1918, accrued, in part at least, in the year 1918. The accrual in that calendar year would be in the proportion represented by the ratio of the part of the tax year falling in the calendar year 1918 to the total tax year. However, this point alone would involve a relatively small amount and the question, so far as we know, is not of general importance. Therefore, we have not desired to burden the Court with considering that particular point.

Respectfully submitted,

KARL D. LOOS,
E. BARRETT PRETTYMAN,
PRESTON B. KAVANAGH,
Attorneys for Petitioner,
707 Munsey Building,
Washington, D. C.

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